UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL DONOVAN,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-226-B-W
	)	
MARTIN MAGNUSSON, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT AND MOTION FOR A PRELIMINARY INJUNCTION AND ORDER ON MOTION TO STRIKE

Daniel Donovan is the plaintiff in the 42 U.S.C. § 1983 action seeking remedy for alleged violations of his First Amendment rights in incidents associated with the opening of his privileged mail at three Maine correctional facilities: The Bolduc Correctional Facility, the Maine State Prison, and the Charleston Correctional Facility. Early on, Donovan filed a motion for preliminary injunction. (Docket No. 7.) The State has filed a motion for summary judgment (Docket No. 21) arguing that Donovan has not adequately grieved some of the mail incidents at Charleston of which he complains and that, as to later incidents at that facility, the grievance procedure did not become final until after he filed this action. It is with great reluctance that I recommend that the Court grant the State's motion because of this latter argument; the State is right that legally it is entitled to such a disposition. Accordingly, I recommend that the Court **DISMISS** this complaint **WITHOUT PREJUDICE** to Donovan's right to immediately refile the complaint as to those claims that are now fully exhausted. Such a disposition would moot the motion for preliminary injunction. The State has also filed a motion to strike Donovan's response to

its statement of fact. (Docket No. 36.) The motion to strike I **DENY;** it is an overreaching attempt to undermine what is a better than average, well presented and supported (albeit through incorporation of other evidence already in the case) pro se prisoner Federal Rule of Civil Procedure 56 opposition.

Discussion

Motion to Strike

In its motion to strike the State argues that Donovan's statement of fact and the record material upon which he relies do not meet the requirements of the Federal Rules of Civil Procedure. (Mot. Strike at 1, Docket No. 43.) The State complains:

> Specifically, they are not made "on personal knowledge" as required by Rule 56(e), but rather on "knowledge and belief." The plaintiff does not differentiate which parts are made on knowledge and which on belief. Neither the court nor the defendants ought to be placed in the position of trying to differentiate for the plaintiff, just as the court and the defendants are not to be placed in the position of searching the record for the plaintiff. Compare Local Rule 56(e).

(Id. at 1-2.) Having, like the State, dealt with a wide array of pro se parties trying to navigate the very onerous summary judgment pleading requirements, I find this objection surprising in view of Donovan's unusually well crafted responsive and additional statement of material fact. I do not find it difficult to differentiate which factual statements are made on personal knowledge and which are based on belief. As for the State's complaint about unnecessary allegations, not material to the exhaustion dispute, it can be assuaged because I have not relied on these in any way.

The State also faults Donovan for bundling several record citations – as many as twenty-nine – and argues that such bundling is an unfair burden on the State and the Court, who must sort them all out. (Id. at 2.) It focuses its attack on Paragraphs 12 and 13 of Donovan's additional facts that represent two key contentions:

> ¶ 12 Mr. Donovan exhausted all issues related to his privileged mail, including all issues at BCF, MSP, CCF. (See Reply to State's Opposition at ¶ 5, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29) (see also Reply to State's Opposition at Attachments – 11, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11)
> ¶ 13 Martin Magnusson responded to the allegations and claims raised by Mr. Donovan in his CCF Grievances 03-CCF-16 and 04-CCF-19. (See Reply to State's Opposition at ¶ 26, 28.)

(Docket No. 36.) Yes, the record citations are not in ideal form as to Paragraph 12 in that they cross reference another pleading and, yes, with respect to Paragraph 13, Donovan is trying to argue an interpretation of the documents relating to his exhaustion efforts. However, Donovan's responsive statement of fact and additional fact is made under oath, as his reply to the State's opposition to his motion for preliminary injunction referred to for support of paragraphs 12 and 13.[1] He refers to attachments that document his grievance submissions based on personal knowledge. I personally have not found Donovan's summary judgment presentation difficult to decipher and the State's own submission indicates that it has been able to join issues with Donovan on the key points and that everyone is on the same page with respect to what each party's record evidence is to support their contentions.

The State should be aware that this Court has an obligation to avoid a hyper-technical application of the rules when deciphering pro se pleadings. Haines v. Kerner, 404 U.S. 519, 520 (1972). When the lapses in form are substantial or have seriously prejudiced a defendant, I have not hesitated to fairly apply the District of Maine Local Rule 56 to the detriment of the pro se plaintiff. However, this case does not require me or the State to engage in any major contortions to comprehend Donovan's factual assertions and identify his record support for these assertions.

[1] Donovan has also attached a series of supporting affidavits to his complaint that pertain to his pre-filing efforts to grieve.

The motion to strike is denied.

Motions for Summary Judgment and Preliminary Injunction

Apropos the dispute over exhaustion of administrative remedies, Congress has provided:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (emphasis added). I agree with the State that: "When multiple prison condition claims have been joined, as in this case, the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." Graves v. Norris, 218 F.3d 884, 885 (8th Cir. 2000); accord Ross v. County of Bernalillo, 365 F.3d 1181, 1189 (10th Cir. 2004) ("We agree [with the 8th Circuit] that the PLRA contains a total exhaustion requirement, and hold that the presence of unexhausted claims in Ross' complaint required the district court to dismiss his action in its entirety without prejudice."); Mubarak Mubarak v. Cal. Dept. of Corrections, Civ. O2-1615, 2004 WL 937215, *3 (S.D. Cal. May 3, 2004) ("This Court concludes the "total exhaustion" approach is supported by the plain language of the PLRA's exhaustion provision and strong policy interests."). It is undisputed that there are three steps to fully exhaust a grievance in each of the three facilities.

The summary judgment exhaustion dispute, while effecting the entire action, concerns only those claims by Donovan that stem from his incarceration at the Charleston Correctional Facility (CCF). There are two: labeled 03-CCF-16 and 04-CCF-19. The State claims that 03-CCF-16, grieving the opening of five pieces of mail and the removal of one item on one occasion, was never fully exhausted because he never filed a stage

three grievance. (State SMF ¶ 6; Riley Aff. ¶ 8.) In fact the State claims -- for the first time in its reply to Donovan's additional facts and in reliance on an additional affidavit -- Donovan never filed a stage two grievance. (Reply SMF ¶ 12; Laliberte Aff. ¶¶ 4-5.)

Donovan claims, with respect to 03-CCF-16, that he filed a stage one grievance on October 25, 2003, and was instructed to attempt to resolve it informally. (Docket No. 30 Donovan Aff. ¶¶ 14, 17,18; Reply State Opp'n Prelim. Inj. Attach. 1.) After Donovan determined that informal resolution was not possible, Donovan pursued a second level grievance by asking Captain Laliberte to forward it to the facility's director. (Donovan Aff. ¶¶ 19, 20, 21; Reply State Opp'n Prelim. Inj. Attach. ¶ 3.) Donovan avers that he did not receive a response from either Laliberte or the director so he could not file a third level grievance. (Donovan Aff. ¶ 22.) Then, on December 21, 2003, Donovan mailed this federal civil rights complaint. However, Donovan avers, the Charleston officials held this § 1983 complaint for nine days before sending it to the Court. (Id. ¶¶ 23, 24.) This triggered the filing of grievance 04-CFF-19. In the first two steps of the delay-in-mailing grievance the only issue raised was the delay-in-mailing issue. (Reply State Resp. Mot. Prelim. Inj. ¶¶ 6-9.) However, in his stage three grievance to the Maine Department of Corrections Commissioner, Donovan included a paragraph at the end complaining of the October 2003 mail opening incidents, indicating that he disagreed with the decisions of the grievance officers and the facility director. (Id. Attach. 10 at 4.)[2] In response, the Commissioner informed him in a February 11, 2004, letter that Donovan's grievance was denied because he did not get the signatures showing that he had made an attempt to informally resolve the matter, adding that, "while there was a flaw in the procedure for sending out your legal mail, a new procedure has been put in place so that this situation

[2] He also requested a transfer to a different facility.

should not occur again." (Id. Attach. 11 at 1.) There is no mention by the Commissioner of Donovan's October 2003 letter-opening plaints.

I conclude, as to the claims grieved in 03-CCF-16, that there is a genuine dispute of material fact as to whether Donovan has done all that he could do to exhaust these claims, given the fact that Donovan claims that he did file a stage two grievance and simply got no response and the State's representation that it has no evidence of Donovan having filed a stage two complaint. Furthermore, there also is a dispute of facts material to whether the incorporation by Donovan of the October 2003 letter-opening complaints suffices for exhaustion (particularly if Donovan succeeded in proving that he did in fact file the second tier grievance vis-à-vis the October events. See Labounty v. Johnson, 253 F.Supp.2d 496, 504 (W.D.N.Y.2003) (concluding that summary judgment was not appropriate when the record contains conflicting accounts regarding plaintiff's efforts to complete the exhaustion process).

However, the State makes one additional argument with respect to exhaustion and I cannot but conclude that it is entitled to the relief it requests, however senseless and wasteful the outcome may seem to my sensibilities. There is no dispute that as to the claims in 04-CCF- 19, Donovan commenced his grievance procedure on December 29, 2003, almost simultaneously with filing this suit, which was docketed by the Court on December 31, 2003. The First Circuit has held:

> Section 1997e(a) mandates that "[n]o action shall be brought ... until [the prisoner's] administrative remedies ... are exhausted." 42 U.S.C. § 1997e(a). This language clearly contemplates exhaustion prior to the commencement of the action as an indispensable requirement. Exhaustion subsequent to the filing of suit will not suffice. Cf. Booth [v. Churner], 532 U.S. [731,] 738 [(2001)] ("The 'available' 'remed[y]' must be 'exhausted' before a complaint under § 1983 may be entertained.") (emphasis added).

Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002). In that case the First Circuit joined several other circuits when reaching that conclusion, citing, among others, Perez v. Wisconsin Department of Corrections and its statement that, "a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits, even if the prisoner exhausts intra-prison remedies before judgment." 182 F.3d 532, 535 (7th Cir. 1999). In light of the State's decision to insist on this course, it could result in a considerable waste of resources to decide otherwise at this time only to have the State to reassert the exhaustion issue at a later date. See, e.g., Hock v. Thipedeau, 245 F.Supp.2d 451, 457, (D.Conn. 2003) (reversing prisoner/plaintiff's jury verdict on grounds that the plaintiff failed to exhaust).[3] For this reason I can only recommend that the Court grant the State's motion for summary judgment and dismiss this action without prejudice. Donovan's motion for preliminary injunction is consequently moot.

[3] Of course, exhaustion is an affirmative defense, Casanova v. Dubois, 304 F.3d 75, 77-78 & n.3 (1st Cir. 2002), and it is waivable, Kane v. Winn, __ F. Supp. 2d __, 2004 WL 1179345, *44 (D. Mass. May 27, 2004). Upon dismissal Donovan would be in a position to immediately refile his suit (and if he does so sans the disputed 03-CCF-16 claims it does not seem as though he would have concern about failing to meet § 1997e(a) and if he includes 03-CCF-16, the dispute of fact about whether or not it has been exhausted, necessitates some sort of evidentiary hearing in any event). The State might wish to reconsider putting the people of Maine, Donovan, and this Court through the expense, time, and hassle of starting this whole process anew from step one. This outcome and that prospect is especially ridiculous in light of the fact that the Charleston claims ultimately appear to expose the State to little, in that the Commissioner only denied the grievance on a "technicality" and says that corrective procedures have been put in place to prevent the problem from recurring. So, if that's true, what more relief would this court be able to grant Donovan in any event?

By enacting provisions such as § 1997e(a) Congress intended to assist the Courts in managing prison litigation. However, whatever the virtues of these provisions, litigation over the gate-keeping mechanisms has added a whole new, and often time consuming, mini-suit layer to these actions. Of course the parties often have discretion in pressing certain claims and invoking certain defenses and, with respect to this particular action, I must say I very much question the wisdom of using the exhaustion requirement as a sword to delay what seems to be the inevitable rather than a shield to assure that prison officials get the first chance to resolve prison condition disputes.

Conclusion

The motion to strike is **DENIED**. And, as explained above, I recommend that the Court **GRANT** the State's motion for summary judgment and **DISMISS** this action **WITHOUT PREJUDICE**. Donovan's motion for preliminary injunction is therefore **MOOT.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Dated June 7, 2004

DONOVAN v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 12/31/03
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

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V.

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